BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JASON LEE COFFMAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,042,801
OSAGE NURSING LLC	)	
Respondent	)	
AND	)	
	)	
SAFETY NATIONAL CASUALTY CORPORATION	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 14, 2009, Order For Compensation of Administrative Law Judge Brad E. Avery (ALJ). Claimant was awarded temporary total disability compensation (TTD) pending the receipt of an independent medical evaluation (IME) report regarding the need for additional medical treatment. Respondent argues that claimant suffered separate, non-work-related injuries to his right shoulder both before and after the date of accident with respondent. Respondent also appeals the May 14, 2009, Order Referring Claimant For Independent Medical Evaluation which referred claimant for an evaluation with the Dickson-Diveley Orthopaedic Clinic regarding treatment recommendations and possible restrictions. Respondent argues that if the Board finds the Order for Compensation of that same date is reversed by the Board, then the referral order would exceed the jurisdiction of the ALJ.

Claimant appeared by his attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent and its insurance carrier appeared by their attorney, Donald J. Fritschie of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held February 20, 2009, with attachments; the transcript of Preliminary Hearing held May 12, 2009, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer an accidental injury which arose out of and in the course of his employment with respondent on July 26, 2008? Respondent argues that claimant's description of the accident and events leading up to and after the accident cast doubt on claimant's testimony. Respondent also argues that claimant suffered separate, non-work-related accidents both before and after the alleged work accident, which are the actual cause of claimant's need for ongoing treatment to his right shoulder.

2. If the ALJ erred in determining that claimant suffered an accidental injury which arose out of and in the course of his employment with respondent, did the ALJ exceed his jurisdiction in ordering an IME at respondent's expense?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order For Compensation should be affirmed and respondent's appeal of the second order for the IME should be dismissed.

Claimant was working as a dietary cook for respondent on July 26, 2008, when he moved a metal table and felt a pop in his right shoulder and experienced pain in the shoulder. The injury was reported and claimant was referred for medical treatment to his family physician, James Seeman, M.D. The report of Dr. Seeman on July 29, 2008, indicates claimant injured his shoulder moving the table and that claimant was referred to the Stormont-Vail Hospital emergency room for an examination. X-rays taken at the hospital indicated no subluxation or dislocation of the shoulder. However, Dr. Seeman diagnosed subluxation of the shoulder and noted swelling and tenderness of the shoulder. Claimant was returned to work at light duty and referred for an orthopedic evaluation.

Claimant's history is significant in that Dr. Seeman examined him on April 28, 2008, after a fall at home when claimant was carrying groceries. At that time, claimant was experiencing no numbness or tingling of the shoulder, but he was feeling "a little crack" when he lifted it up.[1] Dr. Seeman suggested that claimant ice the shoulder and baby the shoulder along to see if it got better. There were several questions to claimant regarding a May 5, 2008, injury and examination by Dr. Seeman, but no such report is contained in

[1] P.H. Trans. (Feb. 20, 2009), Cl. Ex 1.

this record. After the April 28 examination, claimant returned to work for respondent doing his regular job until the incident on July 26, 2008.

Claimant was contacted on August 11 and again on August 29, 2008, by Peggy Stanley, Corporate Safety Director for Americare Systems, Inc. Both conversations were taped by Ms. Stanley. During the conversations, Ms. Stanley advised claimant that his injury claim from the July 26, 2008, injury was being denied as claimant had a long history of right shoulder problems. Claimant admitted the preexisting shoulder problems, but testified that the July 26 injury was more significant than the prior problems and the earlier problems had resolved. Claimant was in need of surgery and had been taken off of the work schedule due to the ongoing shoulder problems. When claimant questioned the availability of surgery, Ms. Stanley assisted him by trying to put him in touch with an orthopedic surgeon in Topeka, Kansas, who might do the surgery at a reduced cost. It is alleged that claimant at some point stated to Ms. Stanley that he would just wait until his shoulder popped out at work and get the surgery done that way. However, this Board Member was unable to find that part of the conversation on the tape. The tape is somewhat hard to hear though, as claimant was riding in a car during one of the conversations.

Claimant's history is also significant in that he injured his right shoulder as a child when he fell. But that incident is not documented in any medical reports contemporaneous with the injury. Additionally claimant stated that he had no lasting problems from that incident. Respondent also argues that claimant's shoulder would repeatedly dislocate. Claimant agrees, but the record is unclear whether claimant was speaking of before or after the work injury on July 26, 2008. Claimant clearly had problems with the shoulder after the work injury, but was able to perform his job for respondent without restrictions before that time.

There is also information to indicate that claimant suffered another fall on October 14, 2008, while at home. The medical reports from Newman Memorial Hospital indicate claimant had shoulder pain and heard a "crack/pop" when he fell.[2] The medical reports do not state the effect this new injury had on claimant's prior shoulder problems.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

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[2] P.H. Trans. (Feb. 20, 2009), Resp. Ex. B.

[3] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[7]

Respondent denied that the incident alleged on July 26, 2008, actually occurred, yet provided no evidence to contradict claimant's description of the accident.[8] This Board Member finds that claimant's description of the accident on July 26, 2008, is supported in this record and affirms that finding by the ALJ. While it is clear that claimant experienced prior injuries to the shoulder, the fact remains that claimant performed his regular job until the work-related injury on July 26 and was unable to do so after the accident. The record

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[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2008 Supp. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[8] P.H. Trans. (Feb. 20, 2009) at 63-66.

is not clear as to when the series of dislocations actually occurred. Perhaps at the time of the regular hearing that can be clarified. The incident on October 14, 2008, remains a question to be answered by an examining or treating physician. This record does not state the extent of the injuries suffered by claimant on that date or the effect that incident had on the right shoulder, another question for the future. The record also appears to be incomplete as to medical reports from the various emergency rooms that treated claimant and as to the mysterious May 5, 2008, medical report of Dr. Seeman.

This Board Member finds that claimant has satisfied his burden of proving that he did suffer an accidental injury on July 26, 2008, which arose out of and in the course of his employment with respondent, for preliminary hearing purposes. Therefore, the Order of the ALJ should be affirmed. This renders moot respondent's objection to the second Order for an IME.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proof that he suffered an accidental injury on July 26, 2008, which arose out of and in the course of his employment with respondent. The Order For Compensation of May 14, 2009, is affirmed. Respondent's objection to the Order Referring Claimant For Independent Medical Evaluation is dismissed and that Order remains in full force and effect.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Compensation of Administrative Law Judge Brad E. Avery dated May 14, 2009, should be, and is hereby, affirmed. Respondent's objection to the Order Referring Claimant For Independent Medical Evaluation is dismissed and that Order remains in full force and effect.

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[9] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of July, 2009.

HONORABLE GARY M. KORTE

c: Stanley R. Ausemus, Attorney for Claimant
Donald J. Fritschie, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge